



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION No. 04-50

SUBJECT: GARY WATERS
PRESIDENT
STATE BOARD OF EDUCATION

A. JURISDICTION:

Mr. Waters is a public officer as defined by NRS 281.4365. As such, the Commission has jurisdiction over the complaint.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Request for Opinion 04-50 (Tab B)
- Reviewed subject's response dated August 1, 2004 (Tab C)
- Conducted searches of corporate records, property holdings, financial disclosure statements, and UCC filings for financial connections as alleged in the complaint
- Reviewed minutes of July 9, 2004 State Board of Education meeting (Tab D)

C. RECOMMENDATIONS:

Based on investigative activities, the Executive Director recommends the Panel find that sufficient cause **DOES NOT EXIST** for the Commission to hear and render an opinion in this matter relating to the provisions of:

- NRS 281.481(2);
- NRS 281.491;
- NRS 281.501(2) and
- NRS 281.501(4).

SPECIFIC REASON:

No allegation or credible evidence of any fact that amounts to or supports a violation by any public officer of the above provisions of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

The Request for Opinion alleges violations of NRS 281.481(2), NRS 281.491, NRS 281.501(2), and NRS 281.501(4) by Gary Waters, President of the State Board of Education. The complaint alleges Mr. Waters violated NRS 281.481(2) by:

1. Using his position as President of the State Board of Education to secure a favorable outcome for Clark County Team Academy (CCTA) charter school. It is alleged that he accomplished this by lobbying other board members to vote against a second charter school's conversion from a subsection 4 charter school to an operational subsection 2 charter school, the second charter school being TEAM A, thereby ensuring increased enrollment for the CCTA charter school. The complaint further alleges that, at the time, Mr. Waters' wife was under consideration for hiring as the Vice Principal or Principal of CCTA.
2. Using his position as President of the State Board of Education to secure a favorable outcome for the Silver State Academy charter school and the Administrator of the Silver State Academy (his "friend" according to the complaint) by lobbying other board members to vote against TEAM A's subsection 2 conversion, thereby ensuring increased enrollment in Silver State Academy; and
3. Using his position as President of the State Board of Education to ensure an unfavorable outcome for TEAM A in its conversion attempt by:
 - a. Requiring TEAM A Charter to meet and prove enrollment requirements for its school, while not requiring the same for other similarly situated schools;
 - b. Advocating against passage of TEAM A's charter because it was fiscally unprepared; and
 - c. Lobbying other board members to vote against TEAM A's conversion.

Further, the Request for Opinion further alleges Mr. Waters violated NRS 281.491 by counseling members of charter schools other than TEAM A in their attempts to convert to operational charters.

Finally, the Request for Opinion also alleges violations of NRS 281.501(2) and NRS 281.501(4), as follows:

1. Mr. Waters violated NRS 281.501(2): advocating the denial of TEAM A's conversion from a subsection 4 charter to a subsection 2 operational charter.
 - a. Voting against the conversion in order to secure additional enrollment for CCTA and Silver State Academy;
 - b. Advocating the denial of TEAM A's conversion to other board members during voting
2. NRS 281.501(4): voting on the denial of TEAM A's charter thereby ensuring increased enrollment Silver State Academy.

E. SUMMARY OF SUBJECT'S RESPONSE:

Mr. Waters responded to the complaint as follows:

1. NRS 281.481(2): He does not maintain any private, financial, or professional, or occupational interest to any charter school in Nevada or in any state and therefore has not violated this statute.
2. NRS 281.491: He did not accept any compensation of any kind for any representation or counseling to any government agency. He, therefore, asserts that no violation of this statute may be sustained.
3. NRS 281.501 (2): He has never received a gift or loan of any kind, nor has he participated in any activity on the board in which a pecuniary benefit would flow to either him or his family.
4. NRS 281.501(4): He has not approved, disapproved, voted, or abstained from voting or otherwise acted upon any matter in his capacity as a member of the Board in which he had a pecuniary interest. He further asserts that all campaign contributions and financial disclosure reports have been completed and submitted pursuant to the appropriate statutes.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.481(2)

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(b) "Unwarranted" means without justification or adequate reason.

NRS 281.491:

Additional standards: Representation and counseling of private person before public agency; disclosure required. In addition to the requirements of the code of ethical standards:

1. A member of the executive branch or public employee of the executive branch shall not accept compensation from any private person to represent or counsel him on any issue pending before the agency in which that officer or employee serves, if the agency makes decisions. Any such officer or employee who leaves the service of the agency shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during his service. As used in this subsection, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

2. A member of the legislative branch, or a member of the executive branch or public employee whose public service requires less than half of his time, may represent or counsel a private person before an agency in which he does not serve. Any other member of the executive

branch or public employee shall not represent a client for compensation before any state agency of the Executive or Legislative Branch of government.

3. Not later than January 10 of each year, any Legislator or other public officer who has, within the preceding year, represented or counseled a private person for compensation before a state agency of the Executive Branch shall disclose for each such representation or counseling during the previous calendar year:

- (a) The name of the client;
- (b) The nature of the representation; and
- (c) The name of the state agency.

The disclosure must be made in writing and filed with the Commission, on a form prescribed by the Commission. The Commission shall retain a disclosure filed pursuant to this subsection for 6 years after the date on which the disclosure was filed.

NRS 281.501:

2. Except as otherwise provided in subsection 3, in addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His pecuniary interest; or
- (c) His commitment in a private capacity to the interests of others.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

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4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

- (a) Regarding which he has accepted a gift or loan;
- (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
- (c) In which he has a pecuniary interest,

without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the

general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

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8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person:

- (a) Who is a member of his household;
- (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
- (c) Who employs him or a member of his household;
- (d) With whom he has a substantial and continuing business relationship; or
- (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

G. RESULTS OF INVESTIGATION:

Allegations regarding NRS 281.481(2):

A violation of NRS 281.481(2) may only be sustained against Mr. Waters only if he has used his position as a public official to secure an unwarranted benefit for himself, a business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity. The complaint provides no credible evidence or supporting documentation regarding any such financial or personal connection.

The complaint alleges Mr. Waters used his position as President of the Board to sway other members to vote against TEAM A’s subsection 4 charter conversion. Presuming this is true, the complaint fails to establish how the denial of TEAM A’s charter benefited Mr. Waters, a business in which he has a significant pecuniary interest or any person to whom he has a commitment in a private capacity. The complaint merely asserts that the denial of TEAM A’s conversion will have the effect of conferring a benefit to both CCTA and the Silver State Academy, because such denial will foster increased enrollment in those schools. Whether increased enrollment at either school was actualized is not an appropriate subject of the complaint, nor was it established by information submitted with the complaint.

Searches conducted regarding corporation ownership and property filings and review of filed financial disclosure statements revealed no pecuniary relationship between Mr. Waters, his wife Susan Bonar Waters, and any of the charter schools or persons mentioned in the complaint. If Mr. Waters somehow benefited from the TEAM A denial, the complaint failed to make clear how this is the case. Further, Mr. Waters is one of ten members of the State Board of Education. The complaint states he initially voted for denial of the charter conversion, but in a subsequent vote taken at the same meeting he voted yes. The minutes from the July 9, 2004 indicate Mr. Waters did in fact vote for denial of the charter conversion, and that no second vote was taken. During public comment Mr. Waters did indicate he would support conversion of the TEAM A charter from subsection 4 to subsection 2 if the fiscal issues were resolved.

With regard to the alleged benefit to the Silver State Academy, the complaint alleges only that the administrator of the Academy is Mr. Water’s friend. The complaint offers no additional

information regarding the extent of this relationship or even the administrator's name. Mr. Waters states he does not even know who the administrator of Silver State Academy is. He further provides he does not have any friends who are involved in the charter school arena.

Absent credible evidence of any unwarranted benefit to Waters, a business entity in which he has a signification pecuniary interest, or any person to whom he has a commitment in a private capacity, there can be no violation of NRS 281.481(2).

Allegations regarding NRS 281.491:

The complaint is unclear regarding exactly how Mr. Waters violated this statute. The complaint makes no claim that Mr. Waters received compensation from any charter school or other private source to represent such a private interest in a matter pending before the State Board of Education, and Mr. Waters denies he represents any charter school. There is no evidence to connect Mr. Waters to any charter school within Nevada, nor was any credible evidence provided within the complaint to substantiate a violation of NRS 281.491. The mere act of offering procedural advice or encouragement to persons before the State Board of Education appears well within the role of a Board member such as Mr. Waters.

Allegations regarding NRS 281.501(2) and 281.501(4):

The complaint alleges that Waters lobbied other members of the Board to vote against TEAM A's charter conversion, although no evidence was presented in support of this allegation nor do the State Board minutes support the requestor's recollection of the events of the July 9, 2004 State Board meeting. However, if you assume that the lobbying did occur, the complaint must provide credible evidence to support the allegation that Mr. Waters voted upon or advocated for the failure of the charter conversion without independence of judgment as his decision was materially affected by (1) his acceptance of a gift or loan; (2) his pecuniary interest; or (3) his commitment in a private capacity to the interests of others. Further, there must be credible evidence that Mr. Waters failed to disclose an interest created by the preceding three criteria. Mr. Waters states that he did not accept a gift or loan, he does not have a pecuniary interest with anyone associated with the decision, and he has no commitment in a private capacity to anyone associated with the decision. The complaint provided no credible evidence to support the supposition that Mr. Waters has any such financial connection. Searches conducted regarding corporation ownership, financial disclosure statements, and property filings revealed no pecuniary relationship between Mr. Waters, his wife Susan Bonar Waters, and any of the charter schools or persons mentioned in the complaint.

Further, Gary Waters states his wife is and always has been an employee of the Clark County School District. Her current position is administrator for an after-school program within the district. She is in the assistant principal pool for future openings in CCSD; however, she is not considering and has not considered leaving the District for employment by a charter school. Further, her education and experience is in elementary education, so she would not be qualified to be a principal or vice principal at Clark County Team Academy as it is a secondary education charter school. This information is consistent with information provided to the Commission in Request for Opinion 04-26, which alleged Mr. Waters did not disclose commitments he had in a private capacity, vis-à-vis his wife's employment, at meetings of the State Board of Education. (RFO 04-26 was dismissed by a Commission panel on July 16, 2004).

Further, the Administrator of Clark County Team Academy Frank Mitchell has stated that Mrs. Waters has never worked with CCTA. The school would not consider Mrs. Waters for employment because of her relationship to Mr. Waters and his position on the State Board of Education. Absence credible evidence to support the allegations, there is no statutory requirement which prohibits Mr. Waters from expressing his personal opinion on the charter conversion to other Board members, nor which precludes his participation in the matter.

H. CONCLUSION:

The Executive Director hereby recommends that the panel find no just and sufficient cause exists for the Commission to hold a hearing and render an opinion on the allegations that the subject violated NRS 281.481(2), NRS 281.491, NRS 281.501(2), or NRS 281.501(4), and further that the allegations be dismissed.

DATED: ____ *December 15, 2004* ____

____ *Stacy M. Jennings* ____
STACY M. JENNINGS, MPA
EXECUTIVE DIRECTOR